BRIEF AND ARGUMENT IN SUPPORT OF THE FOREGOING PETITION FOR CERTIORARI.

SERVICE OF THE SUMMONS AND COMPLAINTS ON THE SECRETARY OF STATE AS AGENT OF PETITIONER WAS INVALID.

This service was had under Section 199, Title 7, Alabama Code, 1940.

Analysis of this Code provision shows that the process may be served on the Secretary of State in two instances:

1. Where the motor vehicle is operated by a non-resident.

2. Where a non-resident is the owner of the motor vehicle and the same is operated by him or by his, their or its agent.

Petitioner was not the owner of the motor vehicle involved in the accident. It was owned by the United States. It was, therefore, not operated by petitioner as owner either in person or by agent. This being true, constructive service could not be had on the Secretary of State as agent of the owner. This is conceded in the opinion of the Circuit Court of Appeals.

The following excerpts from the court's opinion shows this:

Dealers Transport Co. v. Reese 138 F. (2) 638.

(1) "Defendant Clark was an employee of the Corporation and was the driver of the Army truck which produced the injuries. Several trucks were being driven by employees of the Corporation from Ft. McPherson, Georgia, to New Orleans, Louisiana, at the employment and instance of the Army and for redelivery at New Orleans to the Army and were the property of the United States." Opinion p. 3.—Cert Tr. 274.

(2) . . . "the first phrase of the Act thoroughly covers the operation of a motor vehicle by a corporation which can only operate a vehicle through an agent. There exists no necessity nor purpose in the disjunctive phrase 'or the operation (.....) of a motor vehicle owned by such non-resident and being operated by (such non-resident) or his, their or its agents,' of the words 'such non-resident,' which we place in

parentheses. These words appear to be surplusage in view of the language of the first phrase—" Opinion p. 4, Cert Tr. 275.

(3) "The test is operation—not ownership." Opinion p. 5.

The Court is in error in stating that the trucks were being driven from Ft. McPherson, Georgia. They were being driven from the supply depot near Atlanta under the orders of the Military Officers in command and charge of that depot. Fort McPherson is not mentioned in the entire record. Opinion p. 5, Cert Tr. 276.

From the above excerpts the Court effectively and conclusively holds.

(1) The United States was the owner of the trucks.

(2) In determing the validity of service on the Secretary of State the question of ownership of the truck is not material and is eliminated.

Eliminating the operation clause by the owner or agent, on page 4 of the opinion of the Courts says the statute may be read substantially as follows:

> "The operation by a nonresident of a motor vehicle on a public highway in this state. ( ) shall be deemed equivalent to an appointment by such nonresident of the secretary of the State of Alabama—to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint . . ."

From the statute as above set out by it the Court holds in effect that a nonresident, individual, or corporation as principal may operate a motor vehicle by agent on a public highway in Alabama and in case of accident, where the car is driven by agent, may be brought into Court by service of process on the Secretary of State, although in the statute itself no reference to an agent is made. The only way the statute could be made to apply to the agent of the nonresident principal, is to read into it a provision to the effect that where the motor vehicle is driven or operated by the agent the nonresident principal may be made a party by constructive service on the Secretary of State.

Expressly setting out in it the provision, which the Court by implication holds, the clause of the statute authorizing the substituted service would read in substance as follows:

"The operation by a nonresident 'in person or by agent' of a motor vehicle on a public highway in this state, shall be deemed equivalent to an appointment by such nonresident of the Secretary of State of the State of Alabama, - - - to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint - - -"

Accepting the Court's version of the statute and its contents as set out on page 4 of the opinion, has the Court the power to read into the statute a provision extending its terms not only to the non-resident actually operating the motor vehicle but also to its operation by the agent so as to make constructive service on the Secretary of State binding on the non-resident principal who does not actually operate it?

If the uniform decisions of other Courts construing similar statutes are of any weight, the holding of the Court of Appeals is erroneous.

In reaching a correct conclusion the Court will bear in mind that this and similar statutes are in derogation of the common law and are to be strictly construed, *Webb Packing Co. vs. Harman*, (1937) 38 Del. 476, 193 A. 596; *Jermaine v. Graf*, (1939) 225 Iowa, 1063, 283 N. W. 428; *Spearman v. Stover* (1936 La. App.) 170 Sou. 259; *Flynn v. Kramer*, (1935) 271 Mich. 500, 261 N. W. 77; *Vecchione v. Palmer*, (1936) 249 App. Div. 661, 291 N. Y. S. 537.

Such statutes may not be extended by implication to non-residents not coming within their terms. *Jermanine vs. Graf*, *Flynn v. Kramer*, supra.

Prior to a later amendment Section 52 of the Vehicle and Traffic law of New York, Consol. Laws, C. 71 in force in 1929 provided for constructive service upon a non-resident in an action "growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle"

—This New York statute was substantially the same as the Alabama statute paraphrased by the Court of Appeals on page 4 of the opinion.

Construing it, the New York Courts held the application of the statute was limited to those non-residents who personally drove or operated their automobiles. *Wallace vs. Smith*, 265 N. Y. S. 253, 254-6; *O'Tier vs. Sell*, 252 N. Y. S. 400, 403.

In the case at bar Clark was the non-resident and personally operated the truck. The statute applied to him alone.

In *Flynn vs. Kramer*, 271 Mich. 500, 261 N. W. 77, it was held that substituted process against non-residents who "operate" their motor vehicles in the state was held to signify a personal act in working the mechanism of the car and that jurisdiction was not obtained of a non-resident car owner in an action which arose when he was not driving his car or in it, but was a passenger in another car which followed a considerable distance in the rear of the car owned by him.

After the above cited decisions were rendered the New York and Michigan statutes were amended by adding the words:—"or the operation on a public highway in this state of a motor vehicle—owned by a non-resident if so operated with his consent express or inplied."—Vehicle and Traffic Law N. Y. Sec. 52; Comp. Laws Mich. Suppl. 1935, Sec. 4790.

The direct question here up for decision was passed upon in *Morrow vs. Asher*, 55 F. (2) 365.

In that case the Texas statute as quoted in the opinion, reads in part as follows:

> "The acceptance by a non-resident of this State of the rights, privilages and benefits of the public highways—as evidenced by his operating a motor vehicle or motorcycle on any such public highway—shall be deemed equivalent to an appointment by such non-resident of the Chairman of the State Highway Commission of this State or his successor in his office to be his true and lawful attorney upon whom may

be served all lawful process in any civil action or proceeding against him growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle—on such public highway—and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served upon him personally," etc.

The action in the above case was by Morrow, a citizen of Texas, against Asher, a citizen of California, it being averred that one E. E. McNey was the agent, servant and employee of Asher and at the time of the accident was operating a car owned by the defendant using the highways of Texas for transporting a car from Texas to California,—Substituted service was had on Asher by service on the Chairman of the State Highway Commission.

The defendant Asher appeared specifically and moved to quash the service upon the ground he was not "operating" a motor vehicle at the time of the alleged injury and that the statute means exactly what it says.

With reference to this the Court said:

"If the statute means that the use of the Texas highways by a servant or an employee, renders the employer or principal, liable for a tort committed by such servant or employee to be served in the manner indicated, then this motion should be overruled. If it only means that the person who actually operates the car at the time of an alleged tort could be so served, then and in that event the motion should be sustained."

In an able and common sense discussion of the question with citations of pertinent decisions, the learned district judge held the motion to quash good and sustained it.

We call the Court's attention to the following excerpts from the opinion:

(1) "But, when a law making body passes a statute which, because of necessity, subjects a person to a liability to which he was not theretofore subject the statute should be strictly construed."

(2) "If Asher was not operating in that sense upon the Texas highway, he could not be served by notice upon the Chairman of the Highway Commission. To hold that such notice was service upon him under the present facts would be to read into the law what the Court of Appeals of New York refused to read into the New York statute in the case of *O'Tier vs. Sell*, 252 N. Y. 400, 169 N. E. 624, 625."

In the same case Judge Atwell quotes the following from Judge Lehman's opinion in the New York case of *O'Tier v. Sell*:

"We are asked by construction to read into the wrods 'while operating a motor vehicle' an additional clause, 'or while the car is being operated with his permission, express or implied.' That we may not do."

We may here add that the New York and Texas statutes above referred to were enacted and construed by the decisions above cited before the Alabama statute patterned after them was passed. This being true, the construction placed upon them by the Courts is to be treated as incorporated therein. *Kerner v. Thompson*, 356 Ill. 149, 6 N. E. (2) 131.

To the same effect is *Hartley v. Utah Construction Co.*, 106 F. 2d, 953.

The Oregon statute under which constructive service on Utah Construction Co., was upon the Secretary of State of the State of Oregon, was substantially the same as the Alabama statute as set out on page 4 of the Court's opinion.

The car was owned by the Utah Construction Company, a Utah corporation. It was being operated by one Lawler, its vice-president in the state of Oregon at the time of the accident. Lawler was accompanied by his wife. They were residents of California.

The Utah Construction Company moved to quash service of summons on the ground that the Oregon statute applied only to non-residents personally operating an automobile in Oregon. The District Court granted the motion and quashed the attempted service of summons. The case was appealed to the Ninth Circuit Court of Appeals. That Court, Hanes, Circuit Judge rendering the opinion, affirmed the decision of the District Court.

The fourth ground of the motion to quash sets up that Dealer's Transport Company is a foreign corporation, that it had never qualified to do business in Alabama and had no agent in Alabama.

The only business it ever did was transporting trucks through the state for the government. This certainly was not doing business in the state, in the sense of exercising corporate functions. Under this state of affairs the motion to quash and abate the suits should have been granted. This is for the reason that the corporation never acquired a domicile in the state and jurisdiction of its person could not be acquired unless it was doing business in the state at the time of the attempted service of process on the Secretary of State.

Goldey v. Morning News, 156 U. S. 518;
Consolidated Textile Corporation vs. Gregory, 289 U. S. 85, 77 Law. Ed. 1047, 53 S. Ct. 529, is directly on the point. We quote from Sec. (3) of the opinion:

"In order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carying on business there at the time of attempted service."

The principle above contended for are sustained by an unbroken and long line of decisions of the Supreme Court of the United States and the Supreme Court of Alabama.

The Alabama decisions are in line with the decisions of the Supreme Court of the United States. These decisions hold that a foreign corporation is subject to suit within the State

only where it is doing business in the State at the time of service of process.

Ford Motor Co. vs. Hall Auto Co. 226 Ala., 385, 387, 147 So. 603;
Davis vs. Jones, 236 Ala. 684, 687, 184 So. 896;
St. Mary's Oil Engine Company vs. Jackson's Ice & Fuel Company, 224 Alabama, 152, 138 So. 834.

In the last named case the foreign corporation had not qualified to do business in the State as required by Section 232 of the Constitution but the Supreme Court of Alabama held that it was subject to suit, because at the time the process was served it was actualiy engaged in business by agent in the State of Alabama.

There are numerous other decisions to the same effect.

Certainly the record does not disclose that Dealer's Transport Company was carrying on business in Alabama at the time of the attempted service.

They apply to actions of tort as well as assumpsit.

James-Dickinson Farm Mortgage Co. vs. Harry, 273 U. S. 119.

The fact that the cause of action arose in Alabama is immaterial.

Rosenberg Bros. & Co. vs. Curtis Brown Co., 260 U. S. 516 Sec. (3) of opinion.

The death suits are under Section 123, Title 7, Code of Alabama 1940, known as the homicide act. It confers no personal or property rights upon the deceased or his heirs. Its purpose is to prevent homicides by civil punishment. The damages awarded are civil fines supplementing the criminal laws.

Appellants were acting under orders of the Quartermaster General of the United States and other military authorities and the Government Bill of Lading which, though issued later, related back and embraced the terms prescribed by the government for the transportation of the trucks.

Dealer's Transport Company was no longer a public carrier in this enterprise. The general public could not command its services. Its allegiance was to the government and military authorities, whose orders it dared not disobey. Under these orders the trucks were to be transported on their own power from the supply depot in Georgia to the Air Base in New Orleans. For this the public highways were necessary. Neither the United States Government nor appellants were required to obtain the state's consent to use them.

Being at war the state's rights to use the highways were subordinate to the sovereign power of the nation.

The government could act only through agents. At the time of the unfortunate tragedy, Clark was in charge of the trucks under military orders to deliver them at their destination. That he was acting within the line and scope of his authority is not questioned. It is averred in the complaints. That two lives were lost and another seriously injured is deplorable. But Clark's mission was of supreme importance. Notwithstanding the accident it was his stern duty to carry out his orders and deliver the trucks.

Instead of two deaths and a wounded man, thousands of soldiers and citizens had been killed by a cruel and merciless foe. Other thousand had been crippled and mutilated leaving many in far worse condition than a man with a broken leg.

A world tragedy was being enacted. The life of the nation was threatened. Clark was only one of thousands of other agents and instrumentalities of the government in the all out war effort to punish the murderers of the nation's soldiers, sailors and citizens, prevent further slaughter and save the country from invasion. These were not idle dreams, but stark realities and the slaughter continues.

Under these conditions, the state was wtihout right to stop Clark on his mission or through its courts imprison and impose upon him and petitioner staggering civil penalties.

What the state did in the exercise of its sovereignty, retarded the war effort and clashed with national sovereignty.

> "A state has no right to hinder or embarrass the United States, directly or indirectly, in carrying out power to make war, and no local statute can be permitted to stand as a bar to the effective exercise of the war power of the federal government. Moreover, war measures are the exclusive prerogative of the national government, and are not within the purview of the regulatory power of the state."
> 67 C. J. Sec. 61, page 372.

No more effective method of impeding the war effort can be imagined than arresting, imprisoning and levying heavy civil fines upon the government's agents and leaving its trucks sorely needed in prosecution of the war stranded by the roadside.

If the courts of the nation, in upholding its sovereignty, could deny the state of California the right to try Neagle, a deputy marshal, for murder, they have the same power to protect an agent of the government obeying military orders and acting within the scope of its authority at a time when the government was fighting for its existence.

Surely, if the courts could strike down a law of the state of New York levying a tax on $600,000.00 owing by the federal government to Astoria Light H. & P. Company (30 A. L. R. 1458) under a contract for manufacturing gas masks during World War 1, because such manufacture was in aid of the government carrying on war against Germany, certainly the courts have the right to deny enforcement of a statute permitting the levying of a civil fine or penalty enacted for the express purpose of imposing penalties in cases where no common law rights of the deceased or their heirs had been invaded.

This is far different from those cases where the common law rights of individuals have been violated by a government agent acting beyond the scope of his authority. In such cases an action would lie for actual damages.

We respectfully insist that under the uniform decisions of this Court and other decisions and statutes which we have cited, service of the summons and complaints on the Secretary of State as the agent of petitioner were void, that plaintiffs were not entitled to recover in the two homicide cases, that plaintiff, Mack Reese was not entitled to recover punitive damages and that petitioner was and is entitled to the directed verdicts requested in each case and to a dismissal of the actions of the three plaintiffs.

Respectfully submitted,

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